

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 28, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP603

Cir. Ct. No. 2006CV132

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**THE ESTATE OF GARY A. SCHROEDER, BY TODD SCHROEDER, AS
SPECIAL ADMINISTRATOR AND NANCY K. SCHROEDER,**

PLAINTIFFS-APPELLANTS,

v.

**PETER BOARDMAN, M.D., MIDWEST MEDICAL INSURANCE COMPANY
AND WISCONSIN PATIENTS COMPENSATION FUND,**

DEFENDANTS-RESPONDENTS,

**SPOONER HEALTH SYSTEM, INC. AND PHYSICIANS INSURANCE
COMPANY OF WISCONSIN, INC., A/K/A PIC WISCONSIN,**

DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. The Estate of Gary Schroeder and Gary Schroeder’s widow, Nancy Schroeder, (the Schroeders) appeal a judgment entered upon a jury verdict dismissing their medical malpractice claims against Dr. Peter Boardman and related health care entities and insurers. The Schroeders argue there was insufficient evidence to sustain the jury’s verdict. They also argue the jury’s failure to award damages is a perverse verdict, entitling them to a new trial. We disagree and affirm.

BACKGROUND

¶2 This case arises from Schroeder’s visit to the Spooner emergency room on December 16, 2003, where he was seen by Dr. Boardman for chest pain and heaviness. After examining Schroeder and performing a variety of tests to determine whether his pain was related to a cardiac event, Boardman diagnosed Schroeder with gastroesophageal-reflux disease. Boardman treated Schroeder’s pain with a lidocaine cocktail and then discharged him with written instructions to follow up with his cardiologists within seven to ten days. Schroeder failed to do this. Twelve days later he had a massive heart attack and died shortly after.

¶3 The Schroeders sued Boardman, alleging he was negligent in his diagnosis of Schroeder and failed to adequately inform Schroeder of his treatment options. After a four-day jury trial, the jury returned a unanimous verdict in favor of Boardman.

STANDARD OF REVIEW

¶4 “Our review of a jury’s verdict is narrow.” *Morden v. Continental AG*, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. We “will sustain a jury verdict if there is any credible evidence to support it.” *Id.* It is the jury’s role to

evaluate the credibility of witnesses and weigh the evidence. Therefore, when the evidence supports more than one reasonable inference, “we accept the particular inference reached by the jury.” *Id.*, ¶39. We accord special deference to a jury’s verdict in cases where, as here, the circuit court approved the verdict. *Id.*, ¶40. In such situations, we will overturn a verdict only in cases where “there is such a complete failure of proof that the verdict must be based on speculation.” *Id.* (citation omitted).

SUFFICIENCY OF THE EVIDENCE

¶5 Boardman argues the Schroeders disregard the standard for reviewing a jury verdict. We agree. The evidence presented at trial amply supports the jury’s finding that Boardman was not negligent when he diagnosed Schroeder with gastroesophageal-reflux disease and discharged him with instructions to follow up with his cardiologists.

¶6 The jury heard evidence that Boardman ruled out a cardiac cause for Schroeder’s pain after following the Spooner emergency room’s protocol for evaluating patients with chest pain. This protocol required that Boardman take a medical history of Schroeder, conduct a physical exam, perform an electrocardiogram (EKG), and administer various diagnostic lab tests to determine whether Schroeder’s chest pain was related to heart attack, unstable angina, ischemia, or other cardiac event.

¶7 Boardman testified that although Schroeder’s medical history included coronary artery disease, it also included gastroesophageal-reflux disease. He also stated that his physical exam of Schroeder revealed symptoms consistent with the latter disease. On examination, Schroeder was acutely tender in the epigastrium, “where we get the symptoms of gastroesophageal disease.” Further,

Boardman testified Schroeder reported he had experienced no pain while cutting wood outside for two hours before the pain began. By cutting wood, Boardman concluded, Schroeder “did his own cardiac stress test ... which gave me reassurance as [a] clinician that this probably was not cardiac related.” He also stated that Schroeder’s immediate response to the lidocaine cocktail supported his assessment that Schroeder’s pain was not caused by a cardiac event. Additionally, he testified that Schroeder reported his pain as a “five” on a scale of one to ten. By contrast, when Schroeder was admitted to the emergency room on December 28 for a heart attack, he reported his pain as a “ten.”

¶8 Further, Boardman testified that Schroeder’s EKG showed no signs of unstable angina or myocardial infarction. Both of Boardman’s experts—Dr. William Heegard, an emergency room physician and professor of clinical emergency medicine at the University of Minnesota, and Dr. Thomas Davis, an interventional cardiologist—confirmed this conclusion. Likewise, all of the lab tests were normal. Heegard testified that Schroeder’s normal EKG and lab tests indicated it was appropriate for Boardman to rule out a cardiac cause for Schroeder’s chest pain.

¶9 Boardman also introduced evidence that Schroeder’s heart attack on December 28 was not related to the chest pain for which Boardman treated Schroeder on the 16th. Both Heegard and Davis testified that Schroeder had an unusual form of coronary heart disease. Rather than presenting the usual symptoms of gradual plaque build-up and hardening of the arteries, Schroeder’s heart attack on the 28th was caused by a sudden tear in the lining of the artery. Accordingly, there is sufficient evidence to support the jury’s conclusion Boardman was not negligent when he diagnosed Schroeder with gastroesophageal-reflux disease.

¶10 The evidence also supports the jury’s conclusion that Boardman was not negligent when he discharged Schroeder. Boardman testified that he evaluated whether Schroeder should be discharged according to the Spooner emergency room’s seven-point, risk-stratification guidelines. These guidelines permit discharge with a score of three or less. Schroeder had a score of two. Nevertheless, Boardman told Schroeder he was “concerned about his [cardiac] history,” and so Boardman gave Schroeder written instructions directing him to follow up with his cardiologists within the next seven to ten days. It is undisputed that Schroeder did not do this.

¶11 The Schroeders argue that evidence presented at trial supports the conclusion Boardman was negligent. However, even if the evidence did give rise to this inference, we accept the inference reached by the jury as long as it is supported by credible evidence. *Morden*, 235 Wis. 2d 325, ¶39. Here, it was. Therefore, we will not substitute our judgment for that of the jury.

¶12 The Schroeders also argue there was insufficient evidence to sustain the jury’s finding that Schroeder was negligent in the exercise of ordinary care for his own health. Schroeder’s negligence would only be relevant if Boardman were also negligent. Since we conclude the jury’s finding that Boardman was not negligent is supported by credible evidence, we need not address Schroeder’s negligence.

PERVERSITY OF THE VERDICT

¶13 The jury verdict contained nine questions. The first seven inquired about whether Boardman was negligent, whether Schroeder was negligent, and whether any negligence by Boardman or Schroeder was a cause of Schroeder’s death. Question 8 directed the jury as follows.

Regardless of how you answered the above Questions, answer the following: What sum of money will fairly and reasonably compensate plaintiffs, The Estate of Gary A. Schroeder and Nancy Schroeder, in each of the following respects:

- | | |
|---|---------|
| (a) Past pain, suffering and disability to time of Gary Schroeder's death | \$_____ |
| (b) Past wage loss | \$_____ |
| (c) Future loss of earning capacity | \$_____ |
| (d) Past health care expenses | \$_____ |

The jury filled in each of the blanks with a zero. Question 9 then asked, "What sum of money will fairly and reasonably compensate Nancy Schroeder for the loss of society, services and companionship of her husband Gary Schroeder?" The jury filled in the line corresponding to this question with a zero as well.

¶14 The Schroeders focus on the clause, "Regardless of how you answered the above Questions," to argue that the jury attributed no value to Schroeder's pain and suffering, wage loss, and health care expenses, or to Nancy Schroeder's loss. Accordingly, they argue the award is perverse and calls into question the entire verdict.

¶15 However, the Schroeders ignore the jury instructions. Explaining damages, the court, following WIS JI—CIVIL 1023 (2006), instructed the jury: "[Y]ou will consider only the damages plaintiffs' [sic] sustained as a result of the treatment and/or diagnosis of Dr. Boardman and allow plaintiff[s] only the damages that naturally resulted from [this] treatment and/or diagnosis...." Because the jury found Boardman was not liable, it logically concluded the Schroeders sustained no damages as a result of Boardman's diagnosis or treatment.

¶16 Furthermore, Boardman correctly identifies the rule in Wisconsin:

[W]here a jury has answered other questions so as to determine that there is no liability on the part of the defendant, which finding is supported by credible evidence, the denial of damages or granting of inadequate damages to the plaintiff does not necessarily show prejudice or render the verdict perverse.

See Smith v. St. Paul Fire & Marine Ins. Co., 56 Wis. 2d 752, 759, 203 N.W.2d 34 (1973) (citation omitted). Here, the jury's finding that there was no liability on the part of Boardman was supported by credible evidence. Therefore, the verdict was not perverse.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

